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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO PEREZ LOPEZ, Defendant and Appellant.	B165781 (Los Angeles County Super. Ct. No. KA055664)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip S. Gutierrez, Judge. Affirmed.

Robert K. Steinberg for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert S. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Armando Lopez (defendant) appeals from a sentence of life without the possibility of parole, plus 25 years to life. A jury found him guilty of first-degree murder in violation of Penal Code § 187(a),[1] use of a firearm in violation of sections 12022.53(b), (c), and (d), and intentionally firing a gun from a motor vehicle in violation of section 190.2(a)(21). Defendant contends that the trial court erred in failing to instruct the jury on voluntary manslaughter, in its reply to a jury question relating to the necessity of considering defendant's mental/emotional state in connection with malice aforethought, and that he received ineffective assistance of counsel because his attorney failed to ask defendant's expert witness about defendant's blood alcohol content at the time of the shooting. We affirm.

BACKGROUND

From approximately 1996 to 2001, defendant lived in Moreno Valley with his three children, his common law wife, Mavilia Aviles (Aviles), and her two children. Shortly before Christmas of 2001, Aviles's children went to stay with Aviles's sister, Emerita Flores (Flores); Flores' husband, Manuel Jimenez Gaucin (Gaucin); and their children, Angel, Maria, and Gabriel.[2] Around January 7, 2002, Aviles moved in with Flores as well. There was evidence that Aviles did not want to see or speak to defendant after she left him. Defendant went to Flores' house and tried to speak with Aviles, but he left when Flores' mother said she was going to call the police.

On the morning of January 21, 2002, defendant went to Gaucin's home and initially parked his van several houses away, and after leaving for a short period of time, again parked three houses away. Defendant exited the van, opened the doors to the back,

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[1] All further references are to the Penal Code unless noted.

[2] We use first names for convenience and clarity.

made some sort of pushing motion, then got back in the van. A short while later, defendant pulled in front of the Gaucin's driveway. Defendant asked Gabriel, "Where is Mavilia?" When neither Gabriel nor Gaucin responded, Defendant removed a shotgun from under the passenger seat and aimed it out of the driver side window in their direction. Gabriel dove for cover behind a short wall and screamed, "get down!" to Gaucin. Gaucin, looking in another direction, did not see the gun. Defendant shot Gaucin twice, and then drove away. An expert testified that in order to fire the shotgun twice, the trigger had to be released after the first shot and then pulled again. Gaucin died shortly after from the gunshot wounds.

Around 10 a.m., California Highway Patrol Officer Fernandes effected a traffic stop after witnessing defendant's van weaving and straddling the lane lines. When approaching the vehicle on the passenger side, Officer Fernandes saw a shotgun behind the front passenger seat. Upon request defendant gave Officer Fernandes his license and registration and exited the vehicle without assistance. Officer Fernandes administered three field sobriety tests, each of which defendant failed, and then took defendant into custody. At 11:15 a.m., approximately 2 hours after the shooting, defendant's blood alcohol level was measured at .25%. A search of the van uncovered live shotgun shells and two expended shells.

Defendant testified that he had been drinking all weekend and took prescription medicine and that on Monday, the day of the shooting, he drank beer and drove to Gaucin's home. He parked several houses away, then talked to Aviles, who agreed that after gathering her things from the house, she would go home with him. Defendant went to the neighborhood liquor store to buy a six-pack of beer and use the restroom, and then parked several houses away from Gaucin's home. He drank the beer while he waited for Aviles and pulled up in front of the house so they could leave quickly. At that time, he exited the van to move a shotgun that was in his van. He said that the shotgun got "stuck," and discharged twice when he was attempting to put it in the front seat. He said he was not aware that he had shot Gaucin. The next thing he recalls is being pulled over

by Officer Fernandes. He testified he did not intend to hurt anyone that day; he had only met Gaucin twice before the shooting and he thought Gabriel was a "wonderful young man." He said that there was a shotgun in the van because his cousin had given it to him to sell. Defendant also testified that individuals who lived at the residence where Aviles was staying had threatened him, and at the time of the shooting he thought that one of them was going to throw something at him He said one of them had a rake. A criminalist in the blood alcohol testing section of the Los Angeles County Sheriff's Department testified that a male weighing approximately 160 pounds would have to consume approximately ten and one-half, 12 ounce beers to have a blood alcohol level of .25%.

The court instructed the jury on first-degree murder, second-degree murder, and involuntary manslaughter. On January 14, 2003, a jury found defendant guilty of first-degree murder. Defendant appeals.

DISCUSSION

A. Voluntary Manslaughter Instruction

Defendant contends the trial court erred in refusing to instruct the jury on voluntary manslaughter. When the elements of the lesser included offense of the crime charged may be present, the court is under a *sua sponte* duty to instruct on the lesser offense, regardless of the party's failure to request such an instruction; however, when there is no evidence of the lesser offense, the court has no duty to give the instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155; *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708.)

Manslaughter is defined as "the unlawful killing of a human being without malice." (§ 192) A defendant is guilty of voluntary manslaughter in the limited circumstances of when the defendant kills in a "sudden quarrel or heat of passion" (§ 192, subd. (a)) caused by a provocation sufficient to cause an ordinary person to act without due deliberation and reflection (*People v. Breverman, supra,* 19 Cal.4th at p. 163) or kills

in good faith but unreasonable self-defense. (See *People v. Lasko* (2000) 23 Cal.4th 101, 109.) The evidence in this case did not warrant a voluntary manslaughter instruction.

There was no evidence of "sudden quarrel or heat of passion." Defendant did not present any evidence of circumstances that would provoke a reasonable person to kill. He did not testify that the shooting occurred because he was provoked by Gaucin or Gabriel. To the contrary, defendant testified that he did not want to hurt anyone, the gun went off accidentally when he was moving it, and that he did not know he had shot Gaucin.

There is no evidence suggesting any concern by defendant that required self defense. Again, defendant testified the gun went off accidentally. The only possible threat was that it looked like someone was going to throw something at him. He added, however, "it's like a joke." The only other "threats" on prior occasions were that they would call the police if he showed up or throw something at him. These "threats" would not provoke a reasonable person to kill.

People v. Modesto (1963) 59 Cal.2d 722, cited by the defendant, is not relevant, for in that case the court held that it was error not to instruct on involuntary manslaughter in view of evidence that the defendant did not intend to kill or cause injury, including evidence of intoxication. Here, the court did give an instruction on involuntary manslaughter.

Accordingly, the court did not err in not giving a voluntary manslaughter instruction.

B. Adequacy of Court's Response to Jury Question

The defendant asserts that the trial court improperly answered a jury question during deliberations. During jury deliberations, the jury sent out the following question:

> "The instructions read 'When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental

> state need be shown to establish the mental state of malice of aforethought.' [CALJIC No. 8.11] Does this mean we do not have to consider his mental/emotional state or the satisfaction of malice of aforethought."

The judge returned the following written response: "If the word 'or' at line 7 is meant to be 'for,' the answer is no." Evidently this is the response that defendant's counsel approved, for he did not object, and the prosecution requested that the judge answer "yes." The jury did not send any further communications. Defendant contends that this answer was inadequate because it did not explain how the defense of voluntary intoxication relates to malice aforethought.

The trial court correctly responded that the instruction does not mean that the jury is not to consider defendant's mental or emotional state when determining the existence of malice aforethought. (See § 22, subd. (b) [voluntary intoxication admissible to negate express malice]; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982 [intoxication and mental disorder may negate state of mind].) The phrase in the instruction, "no other mental state need be shown to establish the mental state of malice aforethought," simply means that no other mental state other than express or implied malice is necessary to establish the requisite malice aforethought. It has nothing to do with what might negate the required mental state.

Defendant asserts that the trial court should have explained exactly how the instructions on voluntary intoxication related to CALJIC No. 8.11. Defendant never requested such an explanation and therefore waived the contention of error. (*People v. Ramsey* (2000) 79 Cal.App.4th 621, 630.) Moreover, defendant does not explain what further instruction should have been given.

Defendant argues that the court and counsel indicated confusion over the proper response, thus suggesting that the jury should not be expected to understand the response given. The answer to the question appears to be clear. The trial court correctly instructed

the jury that it had to consider the defendant's mental and emotional state in connection with whether he had express or implied malice. The jury did not evidence any confusion. Accordingly, the trial court's response to the jury inquiry was not erroneous.

C. Ineffective Assistance of Counsel

Defendant argues that his trial counsel erred when he did not ask defendant's expert to approximate defendant's blood alcohol at the time of the shooting. To show constitutionally ineffective assistance of counsel, defendant has the burden to show "'(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner.' [Citations.]" (*In re Jones* (1996) 13 Cal.4th 552, 561; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)

Defendant has failed to prove either element. Defendant's trial counsel thoroughly questioned the expert, regarding the "burn off rate," or the rate at which the body breaks down alcohol. Counsel questioned the expert extensively, and elicited testimony that the greater amount of time the body has to break down the alcohol, the less the blood alcohol would be. Allowing the jurors to draw the inference for themselves that defendant's blood alcohol was higher at the time of the shooting does not fall below the minimum standards of professional conduct. Moreover, because defendant consumed a large quantity of alcohol very close to the time of the shooting, his blood alcohol level may have been on the rise during the period following the shooting.

Defendant has also not shown any prejudice experienced as a result of this omission. Defendant remembered and described the events preceding and including the shooting. He was able to drive his van, communicate with a police officer, and shoot Gaucin from 22 feet away. The numerical approximation of the defendant's blood alcohol level at the time of the shooting would not negate the evidence of his ability to

perform intentional acts presented by both the defense and prosecution, nor establish his inability to formulate the intent to kill. Defendant suggested that because of his years of heavy beer drinking, he no longer felt the effects of beer. He testified that the shotgun discharged accidentally when he picked it up—not that he was so drunk that he did not know what he was doing. As defendant can show neither representation below the minimum standards of the profession, nor prejudice from any alleged ineffective representation, defendant's ineffective assistance of counsel claim does not prevail.

DISPOSITION

The judgment is affirmed.

MOSK, J.

We concur:

TURNER, P.J.

GRIGNON, J.